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Evidence

Philip H. Corboy

EVIDENCE

PHILIP H. CORBOY*

From the September to June 1976-1977 term to the September session of the 1977-1978 term, the United States Court of Appeals for the Seventh Circuit reviewed twenty-nine cases which elicited the resolution of evidentiary issues. The means of resolution varied from express reference to the Federal Rules of Evidence[1] to the application of statutes and well-settled case law. This article will review those decisions with a view towards discerning the types of cases in which evidentiary questions have arisen most frequently, the courts' analyses of the Federal Rules of Evidence, and the incidence of uniformity in the application and interpretation of various evidentiary rules.

I
EXPRESS RELIANCE ON THE FEDERAL RULES OF EVIDENCE

The issues expressly governed by the Federal Rules of Evidence and resolved by the United States Court of Appeals for the Seventh Circuit from October, 1976, to the date of this writing[2] included the relevancy of character evidence, prior testimony, scope of cross-examination, rehabilitation evidence, admissibility of other crimes and acts, statements made by co-conspirators, prior theft convictions, expert and lay opinions, admissibility of business records, privileges and necessity for objections—a fundamental evidentiary area.

In some instances the court of appeals thoroughly analyzed the district courts' evidentiary rulings; however, in others the appellate decisions reflected acknowledgment of the broad discretionary powers vested in the district courts. Similarly, in some instances, the court of appeals' affirmances reflected agreement with the interpretation and application of the Federal Rules of Evidence. In other, the affirmances reflected agreement with the results reached by the district courts but indicated a total variance with the evidentiary basis for those results. It is the purpose of this section to review these court of appeals decisions, to analyze the application and

* Philip H. Corboy & Associates; member of the Illinois Bar; J.D., Loyola University School of Law (Chicago).

1. FED. R. EVID. 101-1103 [hereinafter referred to in the text as the Federal Rules or the rules].

2. November 1, 1977.

interpretation of the Federal Rules of Evidence, and to attempt to discern the impact these rules have had on the courts applying them.

A. Reversal of the District Court

1. Use of Character Evidence under Rule 404 in Light of the Rules on Relevancy—401, 402, 403

The defendant in *United States v. Staggs*[3] was wanted by the Marine Corps for desertion. Two agents of the Federal Bureau of Investigation[4] were sent to Stagg's home in southern Illinois to arrest him. Upon learning that the FBI had arrived, Staggs went into his bedroom and picked up a gun. At trial,[5] one of the FBI agents testified that Staggs had pointed the gun at him and had threatened to shoot him if he entered the room. Staggs testified that he had neither pointed the gun at the agent nor threatened him but that he had picked up the gun in order to injure himself. The district court excluded the expert testimony of the defendant's psychologist offered to establish that the defendant was more likely to harm himself than to direct his aggressions toward others. The defendant was subsequently convicted of assault of a federal officer with a deadly weapon.[6]

In reversing the district court decision, the court of appeals quoted rule 404(a)(1)[7] which permits the accused to introduce evidence of a pertinent trait of his character for the purpose of proving that he acted in conformity therewith on a particular occasion.[8] Finding that "a character trait can only be 'pertinent' if its existence is relevant to the outcome of the case,"[9] Judge Swygert recognized that an essential element of the government's proof was that the defendant acted with the specific intent to put the officer in apprehension of bodily harm. Citing rules 401,[10] and 402,[11] he concluded that the psychologist's testimony made more probable the truth of the

3. 553 F.2d 1073 (7th Cir. 1977).
4. Hereinafter referred to in the text as FBI.
5. *See* 553 F.2d at 1074 for a discussion of the district court decision.
6. 18 U.S.C. § 111 (1970).
7. FED. R. EVID. 404 (a)(1). Rule 404(a)(1) states that:
Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: (1) *Character of accused*. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same; . . . .
8. *Id.*
9. 553 F.2d at 1075.
10. In defining "relevant evidence, rule 401 states: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.
11. Rule 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402.

defendant's assertion that he harbored no criminal intent during his encounter with the officer, and that his testimony was relevant to the determination of whether the defendant had violated the statute. Judge Swygert further noted that if the Government's case necessitated only proof of general intent, the testimony was corroborative of the defendant's testimony and, therefore, was relevant to support the defendant's credibility.[12]

Judge Swygert implied that the district court had not ruled on the relevancy of the evidence but rather had used a relevancy argument to avoid excluding the evidence on the ground that the defendant had failed to give the government written notification of his intention to introduce expert testimony. He reasoned that the district court did not choose to impose this notice requirement inasmuch as that ruling would have necessitated a continuance to allow the government to obtain an expert which in turn would have violated the defendant's right to a speedy trial.[13] Thus, the court of appeals' reversal did not necessarily reflect an attitudinal difference from that of the trial court on the admissibility of character evidence under rules 404, 401 and 402.

Similarly, the court of appeals' reversal of the district court in *United States v. Meeker*[14] did not reflect any variance with the lower court on the admissibility of evidence under the Federal Rules. In *Meeker*, the defendant was charged with failing to report income on his 1970 tax returns. To establish its case at trial,[15] the government propounded four objectionable questions to various witnesses. Among these was a question to the defendant's accountant concerning an audit of the defendant in 1966. Rule 404(b) excludes evidence of other crimes or acts unless offered to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."[16] Noting that the government had propounded the question "to help explain the background for a figure on Meeker's 1970 individual tax returns,"[17] Judge Bauer found not only that the question was unnecessary to establish the figure but also that the implication of prior misconduct was an "inexcusable distortion of the facts"[18] and highly prejudicial, *i.e.* a reversible error under rule 403.[19]

12. 553 F.2d at 1075-76.
13. *Id.* at 1077.
14. 558 F.2d 387 (7th Cir. 1977).
15. *See id.* at 388 for a discussion of the district court opinion.
16. Rule 404(b) states that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in confirmity therewith. It may, however, be admissible for the other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FED. R. EVID. 404(b).
17. 558 F.2d at 389.
18. *Id.*
19. Rule 403 states that: "Although relevant, evidence may be excluded if its probative

However, the district court had previously sustained the objection to this question as well as objections to other questions which the court of appeals found to be leading, based on inadmissible opinion and hearsay evidence, and irrelevant.[20] Furthermore, the district court had admonished the jury to disregard the questions. However, the district court had not found the defendant's motion for a mistrial meritorious.[21] Thus, the issue for the court of appeals was not the propriety of the district court's exclusion of the evidence. Rather, the issue was whether the cumulative effect of this line of questioning was so prejudicial that the defendant was denied a fair trial.[22] In answering affirmatively, the court of appeals expressed only its disapproval of the district court's assessment of the prejudicial questioning. Both courts agreed that the evidence was inadmissible under rule 404(b).

2. Federal Rule 803(6)—The Business Records Exception to the Hearsay Rule

In contrast to the relevancy-related cases discussed above,[23] in *Stone v. Morris*,[24] there was a genuine evidentiary ruling conflict between the courts. Stone, a state prisoner, brought a civil rights action against prison officials alleging that the defendants had brutally beaten him. To support his claim at trial,[25] the plaintiff attempted to introduce as a business record in the form of a memorandum written by prison officials to the staff psychiatrist which contained damaging statements contradictory to the testimony of the defendants.

The defendants' argument that the memo was not admissible as a business record focused on the criteria of Federal Rule 803(6).[26] First, they argued that the memo was not prepared in the regular course of prison business. Secondly, they argued that the memo lacked the requisite degree of trustworthiness in that: (1) the memo failed to reveal either the source of the information, or that its maker had a duty to be accurate; (2) there was no evidence showing that the counselors routinely prepared such memos; and (3) there was no evidence that the administrators routinely relied on them.

value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

20. 558 F.2d at 388-90.

21. *See id.* at 388 n.1 for a discussion of the district court decision.

22. *Id.* at 388.

23. *See* text accompanying notes 1-22 *supra*.

24. 546 F.2d 730 (7th Cir. 1976).

25. *See id.* at 737-38 for a discussion of the district court opinion.

26. Rule 803(b), an exception to the hearsay rule regarding the admissibility of records of regularly conducted activity, specifically states:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted

The district court sided with the defendants' arguments and excluded the evidence as hearsay.[27] However, the court of appeals disagreed. In reversing the district court, the court of appeals held that: (1) a prison is a business within the contemplation of rule 803(6); (2) the parties had stipulated to the accuracy of the memo; (3) the document had been made by a staff member; (4) the paper had been retained in the files of the plaintiff; (5) the memo was written in the regular course of the prison's business activity; (6) it most probably was relied upon by prison officials; and (7) the lack of circumstances of the making of the writing would affect only its weight and not its admissibility.[28] Having fulfilled the criteria of 803(b), the memo was held admissible as a business record.

B. Affirmance of the District Court

1. Rule 404(b): Evidence of Other Crimes, Wrongs or Acts

Rule 404(b) provides that: "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may however be admissible for *other purposes* such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[29] When rule 404(b) evidence is used for such *other purposes*, it is further subject to the requirements that it be relevant[30] and not unduly prejudicial, misleading, confusing or cumulative.[31] The Seventh Circuit reviewed several decisions in which the district court's interpretation of various aspects of this rule was contested. In some opinions, the court of appeals' thorough review of the records and its affirmances of the district courts' rulings suggest a true uniformity of opinion among the judges. However, in other decisions it is unclear whether the court of appeals' affirmances denote agreement or simply deferrence to the trial courts discretion.

In *United States v. Krohn*,[32] the defendants were convicted for the unlawful interstate transportation of forged checks.[33] The trial court admitted testimony that the defendants had engaged in a series of transactions

> business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803(6).

27. *See* 546 F.2d at 738 for a discussion of the district court opinion.
28. *Id.* at 738-39.
29. FED. R. EVID. 404(b) (emphasis added).
30. FED. R. EVID. 401. *See* quoted material in note 10 *supra*.
31. FED. R. EVID. 403. *See* quoted material in note 19 *supra*.
32. 560 F.2d 293 (7th Cir. 1977), *cert. denied*.
33. 18 U.S.C. § 471 (1970).

similar to the one charged.[34] The defendants objections were two-fold: (1) that opening a back account was not a criminal act; and (2) that the extended lapse of time, between the acts admitted to show a common scheme and the acts charged in the indictment had reduced the probativeness to such a point that it was substantially outweighed by its prejudicial effect.

Citing rule 404(b), the court of appeals emphasized that "acts" may be admissible for the limited other purposes enumerated in the rule.[35] As to the defendants' second objection, Judge Pell concluded: "Once it is recognized that the Danville evidence did tend to show a common scheme or plan, the insubstantiality of appellants' objection to it is manifest, for broad discretion is properly accorded a district court in its determination whether probative value is outweighed by prejudice."[36] It seemed almost as an afterthought that Judge Pell noted that although a two and one-half month interval in other instances may have the effect the defendants contended, the same intervening period in relation to an eight month scheme would not substantially diminish the probative value of the evidence.[37]

Similar contentions were made in *United States v. Juarez*[38] in which the district court admitted evidene of a narcotics transaction occuring three months prior to the transaction forming the basis of the government's charge.[39] The defendant unsuccessfully contended that the charge for the prior offense had been dismissed prior to trial and, therefore, was not admissible under rule 404(b). As in *Krohn*, the court of appeals summarily dismissed this contention by citing rule 404(b). However, the court of appeals proceeded to extensively recount the trial court's inquiries, observation, rulings and instructions concluding that the district court had properly admitted the evidence as having a tendency to prove intent or state of mind of the defendant.[40] Insofar as both transactions involved the same government agents testifying, the court of appeals added that the testimony was also admissible to prove identity. The court also implied that this type of evidence was admissible to prove a pre-existing design, system, plan or scheme directed forward to the doing of that act.[41]

The court of appeals' expansion of the purposes for which the evidence was offered was necessary due to the fact that the evidence arguably offered

34. *See* 560 F.2d at 296 for a discussion of the district court decision.
35. *Id.*
36. *Id.*
37. *Id.* at 296-97.
38. 561 F.2d 65 (7th Cir. 1977).
39. *See id.* at 70 for a discussion of the district court decision.
40. *Id.* at 70-74.
41. *Id.* at 74.

to show intent was admitted in the government's case-in-chief prior to proof that the defendant had done the act. Although the defendant did not object to the order of proof, the court of appeals justified the district court's ruling on several grounds. First, the statute expressly included the requirement that the distribution of heroin be done knowingly and intentionally[42] from which the court inferred that the indictment included a similar charge. Secondly, the defendant did in fact subsequently deny doing the act, thus placing intent in issue. Finally, the court of appeals noted that although the final instruction was limited to proof of intent, at the time the testimony came in the instruction had included all of the purposes cited in rule 404(b).[43]

As in *Krohn*,[44] Judge Pell affirmed the district court's assessment of the prejudicial effect and the probative value of the testimony in accorance with rule 403[45] by stating: "This weighing process is primarily for the district court to perform; trial judges are much closer to the pulse of a trial than we can ever be, and 'broad discretion' is necessarily accorded them in balancing probative value against prejudice."[46]

In *United States v. Cyphers*[47] the court of appeals was asked to decide whether testimony that a defendant had asked a government informer to purchase narcotics from him shortly after the armed robbery for which he was on trial had been properly admitted. The defendant contended that the evidence was inadmissible under the standards set out in the prior Seventh Circuit case, *United States v. Ostrovsky*,[48] which required that evidence of other crimes fit within an exception recognized by rule 404(b), possess a greater degree of probativeness than prejudiciality, and be clear and convincing. The court of appeals affirmed the district court, noting that the testimony tended to prove motive and consequently fell within rule 404(b), and that any prejudice had been dissipated by the fact that the defendant's use of drugs had been previously brought out by both sides without objection. Although unnecessary for compliance with the Federal Rules, Judge Bauer reviewed the record with a view towards the credibility of the witness who had supplied the questioned testimony and concluded that, insofar as the trial court and jury had believed him, his testimony was therefore clear and convincing.[49]

42. *Id.* at 72-73.
43. *Id.* at 74.
44. *See* text accompanying note 32 *supra*.
45. *See* quoted material in note 19 *supra*.
46. 561 F.2d at 71.
47. 553 F.2d 1064 (7th Cir. 1977), *cert. denied*,
48. 501 F.2d 318 (7th Cir. 1974).
49. 553 F.2d at 1069-70.

2. Consideration of the Relevancy of Otherwise Admissible Evidence

The question of relevancy is pertinent to the resolution of any evidentiary issue, but it is often coupled with other questions as to the admissibility of the evidence. The Seventh Circuit recently reviewed two cases in which the relevancy of the evidence was the focal point of the court's decision and in which—although the court's affirmance seemingly reflected agreement—the opinions expressed disapproval of the district courts' analyses of the Federal Rules of Evidence.

The evidentiary problem addressed by the court of appeals in *United States v. Juarez*[50] involved the propriety of admitting reports pertaining to the narcotics transaction in which the defendant was allegedly involved which had been prepared by the testifying government agents. These reports had been the subject of the cross-examination of the government agents who had admitted that the reports contained generalizations and inaccuracies. The reports were offered to rehabilitate these witnesses and were admitted by the district court on the basis of rules 106, and 801(d)(1)(B).[51]

Rule 106 provides that: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."[52] Rule 801(d)(1)(B) reads as follows:

> (d) *Statements Which Are Not Hearsay*. A statement is not hearsay if—
>
> (1) *Prior Statement by Witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .[53]

The court of appeals' basis for affirmance was that these reports were clearly relevant under rule 402.[54] The court went on to hold that they were not excluded by the hearsay rule because they were offered only to affect credibility.[55] They were also held not unduly prejudicial since the subject matter of the reports had previously been brought out by both sides. Thus, although the Seventh Circuit affirmed the district court's conclusion, Judge Tone disagreed with its analysis of rules 106 and 801(d)(1)(B). In doing so,

50. 549 F.2d 1113 (7th Cir. 1977).
51. *See id.* at 1114 for a discussion of the district court decision.
52. FED. R. EVID. 106.
53. FED. R. EVID. 801(d)(1)(B).
54. *See* quoted material in note 11 *supra* for reference to the substance of rule 402. *See* 549 F.2d at 1114 for a discussion of the court's reasoning on the issue of relevancy.
55. 549 F.2d at 1114.

the court of appeals courteously softened the impact of its expressed disagreement with the district court's reasoning by stating that while not technically applicable, the rules dealt with analogous situations.[56] Incidentally, district courts were admonished to admit such reports only when necessary to remove confusion, false impressions, or other barriers to the ascertainment of truth.

In *United States v. Kopel*,[57] the defendant was convicted of wrongfully using his position as a police officer to extort money from retail liquor dealers and for knowingly making false material statements to a grand jury. Over the defendant's objections of immateriality and irrelevancy, the district court admitted portions of the defendant's grand jury testimony which reflected the fact that he had consulted with his attorney prior to answering the following question: "Other than crippled children, and boy scouts, retirement parties, promotional events, have you ever received any money from any taverns or any retail liquor distributors in the Seventh Police District?"[58] [*sic*]

On appeal, the defendant asserted that by inviting the jury to speculate on the reasons for his consultations with his attorney, the government had improperly prejudiced and misled the jury. The court of appeals overruled the defendant's objection holding that the statements were material to the subject matter of the grand jury's investigation of the defendant for extortion and were relevant to the perjury charge insofar as they tended to prove that they were made wilfully and knowingly. Following the mandate of rule 403,[59] the court of appeals then considered the defendant's assertion that the admission of the transcript was unduly prejudicial.[60]

The defendant's argument that the evidence was reversibly prejudicial turned on the assertion that it was error for the government to assure him that he had a right to consult with counsel and then use the evidence of his consultation against him. The defendant cited cases dealing with the defense of entrapment and estoppel, urged that laymen would view a putative defendant's use of counsel in a grand jury appearance as a "badge of guilt", and asserted that the admission of the transcript would have a "chilling effect" on his sixth amendment rights.[61] The court of appeals found none of these arguments meritorious. It specifically held that the neutral references to the defendant's consultations with his attorney could not be characterized as possessing a prejudicial impact which would substantially outweigh their

56. *Id.*
57. 552 F.2d 1265 (7th Cir. 1977).
58. *Id.* at 1269.
59. *See* quoted material in note 31 *supra*.
60. 552 F.2d at 1268-72.
61. *Id.* at 1270-71.

probative force as to the deliberateness of the false statements.[62]

3. Rule 611(b): Scope of Cross-Examination

In *United States v. Ellison*,[63] a pharmacist and a physician were charged with conspiracy to distribute controlled substances. To establish the commission of an overt act in furtherance of the conspiracy, the government offered telephone company records which disclosed that a private line had been installed between the defendant physician and the pharmaceutical company. On cross-examination of the telephone company official the defendant offered records of several other telephone companies to establish that the installation of such private lines was common practice in the area. The government successfully objected on the basis that the records were irrelevant. Noting that the district court had offered to allow the defendant to put on other witnesses at a later time to establish the custom, the court of appeals viewed the trial court's exclusion of the evidence as an exercise of its discretion to control the order of proof by limiting the scope of the cross-examination to the subject matter of the direct examination.[64] Thus, despite an objection technically governed by rules 401, 402 and 403, the court of appeals cited rule 611(b) which provides as follows: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Court may in the exercise of discretion, permit inquiry into additional matters as if on direct examination."[65]

In sum, neither court thought that the evidence was irrelevant as the government contended, but rather, that it was merely misplaced. Thus, although the government's objection to the evidence was sustained by both courts, the differing bases for the objection and the rulings indicate a discrepancy between the court of appeals and the district court as to which rules were applicable.

4. Rules 701, 702 and 704: Opinions and Expert Testimony

The district court in *United States v. Cyphers*[66] admitted testimony of a government witness that established that the hairs recovered from articles used by the robbers were "microscopically like" hair samples taken from the defendants. The defendants objected on the grounds that the testimony was so speculative as to be irrelevant and prejudicial and was not based on a reasonable scientific certainty. The court of appeals held that the trial court

62. *Id.* at 1272.
63. 557 F.2d 128, 134-35 (7th Cir. 1977).
64. *Id.* at 135.
65. FED. R. EVID. 611.
66. 553 F.2d 1064, 1071-72 (7th Cir. 1977).

had not erred in finding that the requirements of rule 702[67] had been met in that the witness was properly qualified as an expert and the subject matter of his testimony was beyond the ken of the ordinary layman. Without further discussion or disclosure of the witness' qualifications as an expert, Judge Bauer merely stated: "Trial judges are given a broad discretion to determine the qualifications of expert witnesses and to decide whether expert testimony may assist the jury's deliberations."[68] Similar deferrence to the trial court's discretion disposed of the defendants' objections to the relevancy and the probative value of the evidence.[69]

The court also rejected the defendants' contention that rule 702 requires that an expert's opinion be expressed in terms of reasonably scientific certainty. Judge Bauer stated: "We adhere to the rule that an expert's lack of absolute certainty goes to the weight of his testimony, not to its admissibility."[70]

In contrast to *Cyphers*' elucidation of the criteria for the admissibility of expert testimony, the court of appeals in *United States v. Harris*[71] considered the admissibility of opinion testimony of lay witnesses. In *Harris*, the defendant was convicted of wilfully and by means of threats endeavoring to influence, intimidate and impede a witness in the discharge of her duty in another criminal case[72] in violation of 18 U.S.C. § 1503.[73] To sustain a conviction under this statute it was incumbent upon the government to establish the defendant's specific intent to impede the witness. The government produced three witnesses who testified to the defendant's actions for the purpose of circumstantially proving the requisite state of mind. The final witness for the government was the trial judge in the other case, who in response to defense counsel's questions concerning the defendant's emotional appearance during the other courtroom incident, testified that "there was a certain intensity about his appearance" and that "it left the impression with me that he knew exactly what he was doing."[74] On appeal, in addition to contending that the line of cross-examination *questioning* evidenced defense counsel's inadequacy in violation of the accused's sixth amendment right to effective counsel, the defendant also contended that the

67. Rule 702 states that: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

68. 553 F.2d at 1072.

69. *Id.*

70. *Id.* at 1072-73.

71. 558 F.2d 366 (7th Cir. 1977).

72. *See* United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

73. 18 U.S.C. § 1503 (1970).

74. 558 F.2d at 370.

response of the trial judge mandated reversal.[75]

Although the opinion did not delineate the basis for the defendant's objection, the court of appeals overruled the objection in a footnote[76] on the basis of rules 701 and 704. Rule 701 permits that:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact.[77]

Rule 704 provides that: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[78]

On the surface it appears that the testimony fulfilled the criteria of rule 701. However, Judge Sprecher expressed some doubt:

> In the first place, we are not convinced that the testimony was improper. The judge was simply stating his perceptions that defendant's actions had a purposeful, not inadvertent, quality or intensity to them . . . . However, even assuming the testimony was improper, we believe there was sufficient other evidence from which the jury could have inferred that defendant's actions were intended to impede Ms. Hobbs in the discharge of her duties as a witness.[79]

5. Rule 801(d)(2)(E): Statements Made and Evidence Offered by a Co-Conspirator

The offense charged in *United States v. Papia*,[80] elicited consideration of rule 801(d)(2)(E)[81] which excludes from the hearsay rule statements made by a co-conspirator made during the course of and in furtherance of a conspiracy when offered against a party. The challenged evidence in *Papia* was a tape-recorded conversation between the government's witness, an unindicted co-conspirator, and the defendants. The controversy arose due to the fact that the tapes were made after the government's witness had been arrested on unrelated state charges and had decided to cooperate in the investigation of his co-conspirators. Thus, the crux of the defendants' argument was that the statements were not made in the course of and in furtherance of the conspiracy.[82]

75. *Id.* at 371 n.5.
76. *Id.*
77. FED. R. EVID. 701.
78. FED. R. EVID. 704.
79. 558 F.2d at 371 n.5.
80. 560 F.2d 827 (7th Cir. 1977).
81. Rule 801(d)(2)(E) states that: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." FED. R. EVID. 801(d)(2)(E).
82. In the alternative, the defendant argued that the tapes were prior consistent statements

The court of appeals noted that the question of the admissibility of the tapes had been extensively litigated in the district court, and that the trial judge had conscientiously reviewed the contents of the tapes and determined that six of the seven tapes contained statements made during the course of and in furtherance of the conspiracy.[83] Following a brief review of the evidence, Judge Bauer affirmed the district court stating: "It is clear that a co-conspirator's arrest does not in itself terminate a conspiracy as a matter of law for the conspirators may remain fully capable of carrying out their purpose, notwithstanding the arrest of one of their cohorts."[84]

The Seventh Circuit's decision in *United States v. Dorn*,[85] further elucidated Rule 801(d)(2)(E).[86] In this case, two "co-conspirators", who were husband and wife, testified for the government. The wife testified as to conversations with her husband in which he convinced her to join the enterprise. The court of appeals sustained the admission of such testimony, stating that: "[T]he purpose of the Rule is 'to protect the accused against idle chatter of criminal partners as well as inadvertently misreported and deliberately fabricated evidence . . . .' Conversations made by conspirators to prospective co-conspirators for membership purposes are acts in furtherance of the conspiracy . . . ."[87]

Although these government witnesses were referred to as "co-conspirators" throughout the opinion, neither were defendants in the case. Furthermore, the opinion did not indicate that they were unindicted co-conspirators. However, the report of the Senate Committee on the Judiciary notes with regard to rule 801(d)(2)(E) that: "While the rule refers to a co-conspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a co-conspirator for the purposes of this rule even though no conspiracy has been charged."[88]

Insofar as the evidence in this case showed that the witness had conducted many heroin transactions with the defendants, it is highly probable that the court of appeals considered them joint venturers.[89] Therefore,

within the meaning of rule 801(d)(1)(B) which had been prematurely admitted during direct-examination to bolster the state's witness' credibility. The court of appeals summarily dismissed this argument in a footnote finding that the tapes were not prior consistent statements, but were the very statements to which the witness had testified. 560 F.2d at 844-45 n.9.

83. *Id.* at 835 for a discussion of the district court decision.

84. *Id.*

85. 561 F.2d 1252 (7th Cir. 1977).

86. *See* quoted material in note 81 *supra*.

87. 561 F.2d at 1256-57.

88. *See* Report of Senate Committee on the Judiciary accompanying FED. R. EVID. 801(d)(2)(E), 28 U.S.C.A. app. R. 801(d)(2) (1975). *See also* United States v. Spencer, 415 F.2d 1301 (7th Cir. 1969).

89. 561 F.2d at 1255.

Dorn stands for the proposition that statements relating to conspiratorial activities may be admissible despite the fact that the person testifying to the statements was neither a member of the conspiracy at the time of the illegal act nor subsequently charged with the offense as long as there is some basis for concluding that he was at a minimum a joint venturer in the activities.

6. Rule 609(a)(2): Impeachment by Prior Convictions

In *United States v. Papia*,[90] the district court was asked to answer the thorny and controversial question of whether a conviction for theft is encompassed by rule 609(a)(2)[91] which permits the use of prior misdemeanor convictions for impeachment purposes if the prior crime involved "dishonesty or false statement." The district court admitted the evidence on the basis of the government's uncontested assertion that the defendant's theft conviction rested on facts revealing fraud and deceit.[92]

Affirming the district court both in theory and in practice, the court of appeals adopted the holding that even though the offense does not require proof of fraud or deceit as an essential element of crime it may nevertheless be admitted if the proponent of the evidence bears the burden of showing that the conviction "rested on facts warranting the dishonesty or false statement description."[93] In addition to noting that the government had sustained its burden of proof by default, the court of appeals noted that the original charge was for forgery and that the defendant had previously been indicted for having made false statements in obtaining a bank loan.

It is suggested that the court's conclusion that "under the circumstances" the prior theft conviction had been properly admitted implies that the issue will be decided on an ad hoc basis in the future. However, thus far the trial and appellate courts agree on the factors to be considered.[94]

7. Rule 501: General Rule on Privileges

Velsicol Chemical Corp. v. Parsons[95] involved a mandamus action[96] arising out of a grand jury investigation of a corporation, its officers,

90. 560 F.2d 827 (7th Cir. 1977).

91. Rule 609 states that: "For the purpose of attacking the credibility of a witness, evidence that he had been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime . . . (2) involved dishonesty or false statement, regardless of the punishment." FED. R. EVID. 609. *See* 560 F.2d at 847 for a discussion of the district court decision.

92. *Id.*

93. United States v. Hayes, 553 F.2d 824, 827 (2d Cir. 1977) (quoting United States v. Smith, 551 F.2d 348, 364 n.28 (D.C. Cir. 1976)).

94. The significant fact was that the prior conviction rested on facts revealing fraud and deceit. *See* 560 F.2d at 847-48.

95. 561 F.2d 671 (7th Cir. 1977).

96. FED. R. APP. P. 21.

employees and attorneys to determine whether they had withheld certain information from the United States Environmental Protection Agency.[97] The people involved in the defendant's assertion of attorney-client privilege during the course of the investigation were one Neil Mitchell, general counsel of Velsicol Chemical Corporation, and three attorneys of the outside law firm of Sellers, Cooner & Cuneo who were involved in the representation of Velsicol before the Environmental Protection Agency.[98] Despite the fact that the corporation asserted that it would exercise the attorney-client privilege with respect to any communication between it and its outside counsel, Mitchell testified voluntarily before the grand jury disclosing conversations he had had with the attorneys of the Sellers firm. Subsequently, the grand jury subpoenaed the three outside attorneys to give testimony and to produce documents relating to their representation of Velsicol. Velsicol's motion to intervene in the grand jury proceeding was granted. However, its motions to quash the subpoenaes and for a protective order were denied. The district court granted the government's motion to compel the testimony of the outside attorneys based on the finding that Mitchell's testimony was "a general waiver" relating "primarily to the subject matter" rather than to specific conversations.[99]

On appeal, Velsicol argued that Mitchell did not have the authority to waive the corporation's attorney-client privilege, that Mitchell's disclosures did not constitute a waiver insofar as they were inadvertent, and, finally, that Mitchell's disclosures were involuntary because they were compelled by a subpoena. In rejecting all of these claims[100] and affirming the district court's ruling, the court of appeals stated:

> Mitchell was in consultation with outside counsel during the course of his testimony. His situation is hardly controlled by Rule 512 of the Federal Rules of Evidence as suggested by the appellant. Mitchell was well aware of attorney-client privilege and certainly not 'without opportunity to claim the privilege'. Neither was he compelled to waive the privilege. Unlike Ackerly's post-

97. 7 U.S.C. § 136d(a)(2) (1970).

98. The defendant also asserted that the subpoena of a legal memorandum which had been prepared in part by Mitchell with the assistance of counsel from the Seller's firm approximately two years prior to the initiation of the investigation violated the work-product privilege. In rejecting this contention, the court of appeals found that "the documents . . . were not prepared in anticipation of a potential criminal litigation", and that "the focus of the inquiry [is] to determine if their preparation was attended by misconduct," concluding that "under these circumstances, . . . the Government [has] shown adequate grounds to acquire the documents." 561 F.2d at 676.

99. *Id.* at 674.

100. As to the first claim the court stated:

> While Mitchell's presence before the grand jury may be characterized as a client for purposes of determining attorney-client issues, vis-a-vis communications with outside counsel, he was nonetheless possessed of the office of house counsel of the corporation and as such was an agent of the client corporation with authority to waive the attorney-client privilege.

Id. at 675.

ure, Mitchell was not under court order to testify about privileged communications.[101]

Proposed Federal Rule 512 provided that: "Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege."[102] This proposed rule was not enacted by Congress but was substituted by Rule 501. Rule 501 leaves the entire matter of privileges to the general principles of common law in criminal cases and to state law in civil cases in which such law supplies the rule of decision with respect to a claim or defense.[103] Therefore, in *Velsicol*, the court's ruling presumably was not based on rule 512, but rather on "federally developed common-law based on modern reason and experience."[104]

8. Rule 103: Rulings on Evidence

The controversy in *United States v. Castenada*[105] which directed the court's attention to rule 103 focused on the admissibility of the government's medical expert's testimony in light of section 4244 of the Mental Defectives Act.[106] In *Castenada*, the defendant was convicted of voluntary manslaughter. During the trial, the defendant testified on direct examination that he did not remember stabbing the victim. In rebuttal, the government called one of the original examining psychiatrists who testified that the defendant had described the incident, that the description was in "sufficient detail" and that the defendant had "actually acted it out".[107]

On appeal, the defendant contended that his statements to the psychia-

101. *Id.*

102. Proposed FED. R. EVID. 512 (deleted and superseded).

103. FED. R. EVID. 501. Rule 501 sets the general rule on privilege in the following way:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

104. *See* S. REP. NO. 1277, 93d Cong., 2d Sess. 1, *reprinted in* [1974] 4 U.S. CODE CONG. & AD. NEWS 7058; H.R. REP NO. 650, 93d Cong., 2d Sess. 1, *reprinted in* [1974] 4 U.S. CODE CONG. & AD. NEWS 7082. *See also* United States v. Craig, 528 F.2d 773 (7th Cir. 1976) (where witness testified before grand jury allegedly without being informed of the privilege, his testimony was held voluntary and, thus, a waiver of the Speech or Debate clause privilege despite the fact that he had been subpoenaed to testify. The court noted that the witness testified rather than claiming his privilege against self-incrimination, and, therefore, his testimony had not been erroneously compelled).

105. 555 F.2d 605 (7th Cir. 1977).

106. 18 U.S.C. § 4244 (1970).

107. 555 F.2d at 607.

trist were improperly used against him in violation of section 4244 which provides in pertinent part that: "No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this action . . . shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding . . . ."[108] The court of appeals rejected this contention noting that:

> Section 4244 provides that statements of the accused are inadmissible only 'on the issue of guilt'. In this case, the defendant opened the door on direct examination to the content of statements made during his examination. The testimony of Dr. Brooks was elicited in order to attack Castenada's credibility and as such was proper impeachment. The testimony of Dr. Brooks was approved by the Government on the limited issue of credibility rather than on the issue of guilt and thus did not violate the statute.[109]

The court's failure to find error in admitting this evidence was buttressed by the absence of any objections to the expert's testimony in the record. In a footnote, the court noted that rule 103(a)[110] places an affirmative duty on the party assigning errors to the admission of evidence to make a timely objection or motion to strike. Although recognizing the possible applicability of rule 103(d)[111] which allows judicial notice of plain errors affecting substantial rights despite the absence of an objection, the court also recognized that its finding that the statute had not been violated precluded the conclusion that there had been any error at all, let alone "plain error".[112]

II

IMPLICIT RELIANCE ON THE FEDERAL RULES OF EVIDENCE

In some instances, the evidentiary questions posed to the Seventh Circuit were resolved by precedent which had formed the basis of the Federal Rules of Evidence. In these circumstances, the court of appeals apparently was of the opinion that reference to and citation of the Federal

108. *Id.* at 608.

109. *Id.* at 609.

110. Rule 103 states that:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or . . . .

FED. R. EVID. 103.

111. Rule 103(d) on rulings regarding plain error states that: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." FED. R. EVID. 103(d).

112. 555 F.2d at 610 n.1. The defendant further contended that the prosecution had improperly dealt with his past criminal record impliedly invoking a violation of Federal Rule 404(b). The court again noted that there had been no objections or motions to strike made, and refused to find that the defendant had been so unfairly prejudiced as to raise the doctrine of plain error. *Id.* at 610-11.

Rules would be redundant and of minimal value. This section will be devoted to an analysis of those decisions and those Federal Rules that this author feels implicitly support the resolution of the evidentiary issues.

A. Rule 1101 and Its Effect on Federal Rules 801 and 802.

In *United States v. Yates*[113] and *United States v. Harris*[114] the court of appeals considered the propriety of the trial judge relying on hearsay allegations and evidence in imposing a sentence. In the *Yates* sentencing hearing, a government witness was allowed to testify that the defendant, convicted of possessing and distributing cocaine, had been reported to have sold marijuana and drugs while released on bond.[115] This testimony was based on information supplied to the witness by others. The defendant argued that the pre-sentence report prepared by the probation officer was the proper primary source of information and that he, the defendant, should have been afforded an opportunity to rebut claimed inaccuracies in the statements from which testimony had been given at the sentencing hearing.

In affirming the sentence imposed by the district court, the court of appeals relied on the following two conditions[116] which had been met which supported the district court's admission of the hearsay testimony. First, the defendant had been given an opportunity to deny the accuracy of the hearsay statements. Second, in imposing sentence, the trial judge had expressly disclaimed reliance on the hearsay statements.

These same limitations on the admissibility of hearsay in sentencing hearings were the focal point of the court of appeals' decision in *United States v. Harris*.[117] In *Harris*, the court of appeals premised its discussion of these two limitations by holding that "reliance upon hearsay in assessing punishment is not per se improper."[118] However, the court also noted that "the Supreme Court [had] never suggested that a consideration of hearsay [was] always proper."[119]

In the court of appeals' analysis, its function was to strike a balance between precluding reliance on erroneous hearsay and providing the trial court with the discretion to admit the requisite amount of evidence to ensure an informed sentencing decision.[120] As in *Yates*, the court noted that where the sentencing judge relies on the hearsay information (the accuracy of

113. 554 F.2d 342 (7th Cir. 1977).
114. 558 F.2d 366 (7th Cir. 1977).
115. 554 F.2d at 343.
116. *Id.* at 343-44.
117. 558 F.2d at 366.
118. *Id.* at 372.
119. *Id.* at 373.
120. *Id.* at 374.

which is contested), the defendant must be given at least some opportunity to rebut that information. However, the court rejected the rule that allowed rebuttal only in instances in which the trial judge *expressly* relied on the hearsay information.

In its stead, the Seventh Circuit adopted the Second Circuit rule[121] that the defendant should be given an opportunity to rebut the hearsay information if "it was not improbable [that] the trial judge was influenced by improper facts in imposing sentence."[122] The court concluded that such influence was not improbable in light of its findings that the defense counsel most likely had failed to examine the presentencing report, that there was a discrepancy between the evaluation made in the presentence report and the evaluation made in the objectionable hearsay report, and that the hearsay report lacked any indicia of truthworthiness. Thus, the court of appeals vacated the sentence and remanded for resentencing to afford the defendant an opportunity to contest the accuracy of the statements in the hearsay report.

The *Harris* court's statement that "reliance on hearsay in assessing punishment is not per se improper" reflects the application of rules 1101,[123] 801,[124] and 802.[125] Hearsay is defined in rule 801 as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and is generally excluded by rule 802.[126] However, rule 1101 provides that the Federal Rules are inapplicable in "proceedings for extradition or rendition; preliminary examinations in criminal cases; *sentencing* (emphasis added), or granting or revoking probation; issuance of warrants for arrest, criminal summons, and search warrants; and proceedings with respect to release on bail or otherwise."[127]

Thus, by virtue of these rules, hearsay statements are admissible in sentencing hearings. However, these late Seventh Circuit decisions condi-

121. *See, e.g.*, McGee v. United States, 462 F.2d 243 (2d Cir. 1972).

122. 558 F.2d at 375 (quoting McGee v. United States, 462 F.2d at 247).

123. Rule 1101(d) states that:

> The rules (other than with respect to privileges) do not apply in the following situations: . . . Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release or bail or otherwise.

FED. R. EVID. 1101(d).

124. Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

125. Rule 802 states that: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802.

126. *See* quoted material in note 124 *supra*.

127. *See* quoted material in note 123 *supra*.

tion the admissibility of such hearsay evidence. Consequently, although inherently premised on the proposition that the Federal Rules do not prohibit hearsay in sentencing hearings, the *Yates* and *Harris* opinions adopted a more restrictive rule on the admissibility of hearsay evidence in sentencing hearings.

B. Rule 201: Judicial Notice

Rule 201 "governs only judicial notice of adjudicative facts" and provides that "a judicially noticed fact must be one not subject to reasonable dispute in that it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[128] This rule implicitly formed the basis for the evidentiary ruling in *Newcomb v. Brennan*.[129]

In *Newcomb*, the plaintiff alleged that his constitutional rights had been violated when he was dismissed from his position as a deputy city attorney by the city attorney who opposed the plaintiff's candidacy for Congress. The district court dismissed the plaintiff's complaint for failure to state a cause of action.[130] Although noting that the dismissal of public employees for reasons of political patronage had been held violative of the first amendment,[131] the district court also noted that this general rule had been held inapplicable to public employees occupying policy-making positions.[132] The district court's conclusion that the plaintiff occupied a policy-making position turned on its observation that the deputy city attorney was exempted from civil service, had no term of office, and had broad duties and powers.

On appeal, the plaintiff contended that the district court erred in taking judicial notice of the Wisconsin statute that defined his civil service status,[133] of the City Charter that defined his term of office,[134] and of the Milwaukee Code of Ordinances that defined his duties and powers.[135] The court of appeals rejected this contention by stating:

128. Rule 201(a) and (b) state that:

> (a) *Scope of rule*. This rule governs only judicial notice of adjudicative facts. (b) *Kinds of facts*. A judicially noticed fact must be one not subject to reasonable dispute in that it is either, (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

FED. R. EVID. 201(a), 201(b).

129. 558 F.2d 825 (7th Cir. 1977).

130. *Id.* at 827.

131. Elrod v. Burns, 427 U.S. 347 (1976).

132. *See id.* at 367 for a discussion of the district court opinion.

133. WIS. STAT. § 863.29(1) (1959).

134. MILWAUKEE, WIS., CITY CHARTER § 83.03.

135. MILWAUKEE, WIS., CODE OF ORDINANCES § 82-200.2(2).

> A court may take judicial notice of facts of "common knowledge" in ruling on motions to dismiss. *Robinson v. Mammoth Life & Accident Ins. Co.*, 454 F.2d 698, 699, (7th Cir. 1971) (per curiam), *cert. denied*, 409 U.S. 872 (1972). We hold that matters of public record such as state statutes, city charters and city ordinances fall within the category of "common knowledge" and are therefore proper subjects for judicial notice.[136]

The court of appeals' reference to matters of "common knowledge" is in line with the language of rule 201(b)(1) that the facts must be "generally known".[137] Furthermore, the source of the facts judicially noticed also fulfilled the criteria of rule 201(b)[138] insofar as those facts were capable of accurate and ready determination by reference to highly accurate public records. Thus, the court's opinion complied with rule 201 despite its lack of reference to it.

C. Rule 901: Requirement of Authentication or Identification

Rule 901(a) states the general principle that: "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[139] This general principle is applied largely by reference to common-law and statutory experience which corresponds in part to the examples set forth in rule 901(b). Thus, the court of appeals has considered the admissibility of evidence which required authentication without reference to rule 901.

In *United States v. Chaney*,[140] the defendant was charged with maliciously attempting to destroy a business affecting interstate commerce.[141] During the trial the government offered evidence of two threatening phone calls made to the business the day of the bombing in which the caller predicted the portion of the building which was later bombed. They were offered in evidence on the theory that the defendant had made them. The defendant objected to this evidence on the grounds that, under *Brady v. Maryland*,[142] the government should have disclosed this evidence to him prior to trial insofar as such evidence was exculpatory. Finding that the evidence was inculpatory and, therefore, not the subject of compelled disclosure, the court of appeals nevertheless noted that when these calls were admitted over the defendant's objection, it was not too late for the defendant to attempt to show a dissimilarity between his voice and the voice

136. 558 F.2d at 829.
137. *See* quoted material in note 128 *supra*.
138. *Id.*
139. FED. R. EVID. 901 (a).
140. 559 F.2d 1094 (7th Cir. 1977).
141. 18 U.S.C. § 844(i) (1970).
142. 373 U.S. 83 (1963).

of the caller. Thus, the court implied that rule 901(b)(4) and 901(b)(5) would have been the better alternative on which to base an objection to the admission of the telephone calls.[143]

Rule 901(b)(4) permits authentication of telephone conversations by "appearances, contents, substance, internal pattern, or other distinctive characteristics taken in conjunction with the circumstances."[144] More specifically, rule 901(b)(5) provides that "identification of a voice; whether heard firsthand or through mechanical or electronic transmission or recording may be authenticated by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker."[145] In the absence of any argument as to the sufficiency of the foundation for these telephone conversations, the court in *Chaney* found it unnecessary to give content to the aforementioned rules in this case.[146]

In contrast, the defendant in *United States v. Kidding*,[147] asserted that a photograph of him was admitted into evidence without proper foundation. However, the court of appeals rejected this contention presumably relying partially on both rule 901(b)(9) and rule 201. Rule 901(b)(9) suggests by way of illustration that "evidence describing a process or system used to produce a result showing that the process or system produces an accurate result" is sufficient to authenticate a photograph.[148] The evidence found sufficient in *Kidding* to support the admissibility of the photograph was a witness' in-court identification of the defendant as the man who had asserted that he was the "owner" of the stolen vehicle corroborated by the witness' identification of the photograph of the defendant as that which he had earlier identified as that of the "owner" of the vehicle. Thus, the court's focus was on the latter part of rule 901(b)(9), *i.e.* testimony going to the accuracy of the result. For this reason, the court omitted reference to the requirement that evidence describing the photographic process should be admitted in conjunction therewith. The court of appeals stated that, with this evidence, the court could consider the photograph and make its own observation whether or not it resembled the defendant.[149] Thus, the court implied that the court could take judicial notice of the accuracy of the photograph in

143. 559 F.2d at 1097.

144. Rule 901(b)(4) states: "By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule . . . (4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." FED. R. EVID. 901(b)(4).

145. FED. R. EVID. 901(b)(5).

146. 559 F.2d at 1097.

147. 560 F.2d 1303 (7th Cir.), *cert. denied*, 98 S. Ct. 217 (1977).

148. Under Rule 901(b)(9), a process or system may be authenticated by: "Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." FED. R. EVID. 901(b)(9).

149. 560 F.2d at 1312.

accordance with rule 201,[150] and the comments to rule 901(b).

D. Rule 614: Calling and Interrogation of Witnesses by the Court

The decision in *United States v. Kidding*,[151] also gave content to rule 614(b) which states that "a court may interrogate witnesses, whether called by itself or by a party."[152] This authority to question witnesses is a well-established common law principle subject only to the limitation that the trial judge should not assume the role of an advocate.[153] Insofar as the committee comments to rule 614(b) acknowledge the inability to formulate a rule delineating the manner in which interrogation should be conducted and the proper extent of its exercise,[154] such issues necessarily are resolved on an ad hoc basis.

In *Kidding*, defendant Kidding had been asked nineteen questions covering four pages of transcript while defendant Brown had been asked thirty-seven questions covering eight pages of transcript. In affirming defendant Brown's conviction, the court of appeals initially noted that "in a non-jury case questioning by the trial judge will rarely be prejudicial."[155] However, the court continued to analyze the non-jury case cited by the defendant in which a conviction was reversed concluding that the reversal was not predicated on the extent of the questioning but rather on evidence showing that the trial judge had already decided the case adversely to the defendant prior to hearing all the evidence.[156] In applying this case in *Kidding*, the court of appeals noted an additional factor to be considered in assessing the effect of a trial judge's questioning: the attitude of the judge towards the case at the time of questioning.[157] Therefore, *Kidding* stands for the simple proposition that the court of appeals will sustain questioning of witnesses by the lower court as long as the trial judge remains impartial.

E. Rule 501: Privileges

Unlike the decision in *Velsicol Chemical Corporation v. Parsons*[158] in which the Seventh Circuit cited superceded Federal Rule 512,[159] in *United States v. Tucker*[160] the court cited neither a proposed nor an adopted federal

150. *See* material quoted in note 128 *supra*.
151. 560 F.2d at 1303.
152. Rule 614(b) states that: "The Court may interrogate witnesses, whether called by itself or by a party." FED. R. EVID. 614(b).
153. *See id.* and accompanying Advisory Committee's Note, 28 U.S.C.A. app. R. 614(b).
154. *Id.*
155. 560 F.2d 1314 (7th Cir. 1977).
156. United States v. Cassiagnol, 420 F.2d 868 (4th Cir.), *cert. denied*, 397 U.S. 1044 (1970).
157. 560 F.2d at 1314.
158. 561 F.2d 671 (7th Cir. 1977) (*en banc*). *See* text accompanying note 95 *supra*.
159. *Id.* at 675.
160. 552 F.2d 202, 210 (7th Cir. 1977).

rule to support its finding that the district court had erred in failing to require that the government either disclose the identity of an informer or dismiss the prosecution. As noted previously, this issue may be resolved by reference to rule 501 which in criminal cases generally demands reference to the common law of privileges.[161]

In *Tucker*, the defendant was indicted for distributing heroin. The transaction allegedly occurred in the presence of two government informers. Insofar as the defendant denied all involvement in the sale, his testimony directly conflicted with that of one of the agent-informers. Although the government conceded that the conviction could not have been obtained without the testimony of this informant, the government refused to disclose the identity or whereabouts of the second informant whose testimony was the only means by which the factual controversy presented by the other testimony could be resolved. The district court refused to compel disclosure, but stated that:

> If you have one-on-one contradictory testimony, and the government has a second witness who could clarify it, and they do not call that witness, I am thus obligated to assume, as I would tell a jury, that they must draw the conclusion that that witness if called would testify favorably to the defendant.[162]

The district court further noted that this inference as to what a missing witness would testify would add only some evidence to the defendant's testimony. Obviously, it did not add enough since the trial court subsequently convicted the defendant.[163]

On appeal, the defendant relied on *Roviaro v. United States*[164] in which it was stated that: "where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause, the privilege must give way."[165] The court of appeals rejected the government's attempt to distinguish *Roviaro* and upon "balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."[166] In doing so, the Seventh Circuit concluded that the district court's refusal to compel disclosure had denied the defendant a fair trial. However, the court did not feel that this conclusion in and of itself mandated a judgment of acquittal.

The court proceeded to consider the defendant's second argument based on the district court's ruling on the evidentiary missing witness

161. *See* text within note 103 *supra*.
162. 552 F.2d at 207.
163. *See id.* at 204 for a discussion of the district court decision.
164. 353 U.S. 53 (1957).
165. *Id.* at 60-61.
166. 552 F.2d at 208 (quoting Roviaro v. United States, 353 U.S. at 62 (1957)).

inference. Affirming the district court's ruling on this issue, the court of appeals noted that the rule authorizes only a permissive inference rather than a presumption that the testimony if produced would be unfavorable. Furthermore, Judge Pell stated that: "The rule of the inference may . . . be a limited one; it has been stated, e.g., that the missing witness inference may diminish the strength of the non-calling party's evidence and strengthen the opponent's evidence but does not have the force of independent direct evidence."[167]

In sum, the court of appeals held that the denial of the defendant's motion for a judgment of acquittal at the trial level did not constitute fatal error. The defendant's opportunities, however, were not completely extinguished. Judge Pell and his colleagues reversed and remanded for a new trial in which the identity of the informer would be disclosed.[168]

F. Rule 404: Character Evidence Not Admissible to Prove Conduct, Exceptions, Other Crimes

Generally, rule 404 excludes evidence of a person's character and of other crimes, acts or wrongs when offered for the purpose of proving that he acted in conformity therewith on a particular occasion.[169] However, this rule is subject to several exceptions, two of which presumably formed the basis of the Seventh Circuit's decision in *United States v. Loman*,[170] and *United States v. Grabiec*.[171]

In *Loman*, one of the defendants was charged with assault with a dangerous weapon of a postal carrier while performing her official duties. At trial, one defendant testified that she had assaulted the postal carrier in self-defense. To establish this defense, the defendant offered the postal carrier's file which included some complaints against her as a mail carrier. Concluding that it was irrelevant, the district court refused this offer of proof either for impeachment purposes or for proof of a violent character of the victim.[172] The court of appeals affirmed without discussion.

Without regard to relevancy, this evidence seems to fulfill the criteria of the second exception to rule 404(a) which admits evidence of a pertinent trait of character of the victim of the crime when offered by an accused.[173]

167. 552 F.2d at 210 (citing Burgess v. United States, 440 F.2d 226 (D.C. Cir. 1970)).
168. 552 F.2d at 211.
169. *See* quoted material in note 7 *supra*.
170. 551 F.2d 164 (7th Cir.), *cert. denied*, 97 S. Ct. 2982 (1977).
171. 563 F.2d 313 (7th Cir. 1977).
172. *See* 551 F.2d at 166 for a discussion of the district court opinion.
173. Rule 404(a)(2) states that:
Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except. . . . (2) *Character of victim*. Evidence of pertinent trait of character of the

The rule itself does not indicate the type of crime which permits the circumstantial use of character evidence of the victim of the crime. However, the advisory committee's notes accompanying rule 404(a) suggest that such evidence is limited to use in support of a claim of self-defense to a charge of homicide or consent in a case of rape.[174] Therefore, although *Loman* was a criminal case, the court may well have adopted the narrow interpretation of the rule suggested by the committee's notes. Furthermore, the court may have found that the information in the file pertained only to general character traits rather than specific traits pertinent to a claim of self-defense. In light of the court's cursory review of this evidentiary issue, the basis of the court's affirmance remains unclear.

Similarly, the court of appeals' decision in *United States v. Grabiec*[175] affirmed the admission of evidence of other crimes as governed by rule 404(b). In *Grabiec*, the defendant was convicted of a conspiracy to extort money for "fixing" a licensing violation.[176] During the course of the trial, the government offered testimony concerning four extortive license application transactions conducted by a co-defendant. The defendant argued that the admission of this testimony constituted reversible error on the ground that these offenses were wholly independent of the offense charged.

Rule 404(b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove that character of a person in order to show that he acted in conformity therewith. It may, however be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.[177]

Without citing this rule, the court of appeals referred to an earlier Seventh Circuit case in which it was held that "evidence of other criminal activity is clearly admissible if it is relevant to indicate motive or *some other element of the crime charged* unless minor probative value is outweighed by major prejudicial effect."[178] Although this statement is broad enough to encompass the admissible purposes of rule 404(b), *i.e.* motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or

> victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait or peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; . . .

FED. R. EVID. 404(a)(2). The district court correctly concluded that this character evidence of specific instances of conduct was not admissible for impeachment purposes for rule 608 limits such character evidence to the trait of truthfulness or untruthfulness. FED. R. EVID. 608.

174. *See* FED. R. EVID. 404(a)(2) and accompanying Advisory Committee's Note, 28 U.S.C.A. app. R. 404(a)(2) (1975).

175. 563 F.2d 313 (7th Cir. 1977).

176. 18 U.S.C. § 1951 (1970).

177. FED. R. EVID. 404(b).

178. U.S. v. Pate, 426 F.2d 1083 (7th Cir. 1970) (emphasis added).

accident, the court of appeals ultimately concluded that the four transactions "illuminated the character of the conspiracy and the extent of the involvement of the parties. The role played by Moran and his *modus operandi* were unquestionably probative matters."[179]

Although this purpose does not explicitly fall within those enumerated in rule 404(b), the court's emphasis on the limiting instruction that the evidence could not be considered with respect to the objecting defendant may justify its conclusion that he was not so unduly prejudiced as to result in the denial of a fair trial.

However, the majority opinion was severely criticized by Judge Swygert.[180] He suggested that the dissimilarity between the prior transactions and the crime charged precluded the possibility that the former could denote intent, preparation, plan, etc. of the latter, that two of the transactions had occurred after the conspiracy had ended, and finally, that the admonishment of the jury was, probably, totally ineffective. In light of the fact that character evidence, as presented in the context of other crimes, acts or wrongs, may be of slight probative value and may be very prejudicial, this author tends to agree with Judge Swygert that the majority disregarded the exclusionary portion of rule 404(b) and the irrelevancy of the evidence of the prior transactions with respect to the objecting defendant. Hopefully, this was only a momentary lapse on the part of the majority of the court.

G. Rule 608: Evidence of Character and Conduct of Witness

In *United States v. Bursten*,[181] the prosecution attempted to introduce into evidence the plea agreement between a government witness and the government which contained a sentence indicating the witness' readiness to submit to a polygraph examination in regard to the matter embodied in the agreement including disclosures corroborative of his testimony at trial. Although the district court initially excised the objectionable sentence, it reversed its ruling during the cross-examination of the witness and allowed the jurors to view the entire agreement. On cross-examination the defendant did not emphasize the fact that the witness had not in fact taken a polygraph test but urged reversal on appeal.[182]

After suggesting that the admissibility of the *results* of a polygraph examination is a matter within the discretion of the trial court,[183] the court of appeals held that the district court had erred in admitting this statement

179. United States v. Grabeic, 563 F.2d at 318. Moran was a central figure in the conspiracy at issue as well as in the prior transactions of the co-defendant.
180. *Id.* at 319-21.
181. 560 F.2d 779 (7th Cir. 1977).
182. *Id.* at 785.
183. *Id. See* United States v. Infelice, 506 F.2d 1358 (7th Cir. 1974).

because it had been offered by the prosecution on direct to support the credibility of the witness. In a per curiam opinion, the court stated: "Given the awesome powers which the prosecution may wield in order to ensure the veracity of its witnesses' statements, we strongly condemn this *superfluous practice*. Prosecutors who introduce such evidence in the future to obtain convictions should expect reversal."[184]

However, the court further noted that the trial court had protected against the possibility that the sentence would affect the jury's assessment of the witness' credibility by refusing to permit it to be read aloud and curtailing all discussion of it in the presence of the jury. In light of these circumstances and the protracted cross-examination of the witness, the court concluded that the jury's perusal of one sentence would not constitute reversible error.

The court's statement that the government's offer of proof was a "superfluous practice", in light of its finding that the evidence was offered to support the credibility of the witness, implies judicial recognition of rule 608(a). This rule provides that:

> (a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.[185]

Clearly, the statement referring to the witness' willingness to take a polygraph test on his disclosures is evidence attempting to show a truthful character. However, these statements were offered on direct examination of the witness, prior to any opportunity for the defense to attack the credibility of the witness. Therefore, the court's conclusion that the admission of such evidence should demand reversal in the future complies with rule 608.

III
MISCELLANEOUS EVIDENTIARY QUESTIONS

The United States Court of Appeals for the Seventh Circuit has reviewed in the past year several cases in which the evidentiary questions have not been governed either explicitly or implicitly by the Federal Rules of Evidence. A review of these cases follows.

In *United States v. Crowell*,[186] the defendant was found guilty of four firearm violations.[187] To sustain this charge, the government was required to

184. *Id.* (emphasis added).
185. FED. R. EVID. 608(a).
186. 559 F.2d 1084 (7th Cir. 1977).
187. 26 U.S.C. §§ 5801-5849 (1968).

prove that the shotgun in question had a barrel length of less than eighteen inches. The shotgun was admitted into evidence and taken to the jury room during its deliberation. However, prior to its admission, the government failed to elicit testimony as to the measured length. Futhermore, the defendant did not attempt to show that the barrel was greater than eighteen inches in length. The only testimony with regard to length of the gun came at the close of all evidence when the prosecution said the gun was about fourteen inches in length, and the district court judge replied that the jury could determine the matter.[188]

In a per curiam opinion, the court of appeals affirmed the use of real evidence in lieu of and without the support of testimonial evidence stating: "While the better practice would have been to prove the barrel's length by measurement testimony, the shotgun was in the juror's presence during their deliberations, and they could observe that its barrel length was about 14 inches and under 18 inches, as required."[189]

The court of appeals' simplistic resolution of this issue underscores the viability of the absolute right to an appeal. Although this right to an appeal places an affirmative duty on lawyers to prepare briefs and present oral arguments regardless of the weaknesses of their clients' challenges, there is no correlative duty on the reviewing courts to expend judicial time and energy in writing opinions to simply affirm a lower court's decision. Thus, it is suggested that this appeal could and should have been disposed of summarily in a per curiam opinion that simply stated "Affirmed."

In a second per curiam opinion, the court of appeals in *United States v. Spears*[190] reversed the defendant's conviction on the ground that the trial judge had improperly commented during defense counsel's closing argument thereby depriving the defendant of a fair trial. Following a review of the colloquy between the defense attorney and the trial judge conducted in the presence of the jury, the court of appeals concluded:

> On balance, we think that the trial judge "lost his cool", departed from the equanimity of spirit required of him, and seriously prejudiced the defense . . . In the instant case, the defense counsel had engaged in conduct for which he deserved reprimand and censure. However, any such reprimand or censure should have been made outside the presence of the jury.[191]

Again, although rule 614 permits the court to call and interrogate witnesses on its own motion,[192] the Federal Rules are silent on the issue of whether the court may comment during closing argument. However, *Spears*

188. *See* 559 F.2d at 1085 for a discussion of the district court decision.
189. *Id.*
190. 558 F.2d 1296 (7th Cir. 1977).
191. *Id.* at 1298.
192. Rule 614 in pertinent part states that:

stands for the proposition that the court may not reprimand counsel during closing argument if such comment is so castigating as to discredit counsel in the eyes of the jury.

As in *United States v. Kopel,*[193] the appeal in *United States v. Howard*[194] required consideration of the materiality of the defendant's grand jury testimony which formed the basis for his conviction for perjury.[195] The defendant-witness was an attorney who was asked whether he had met with his client, John Lind, on a particular date. Lind was the subject of the grand jury's investigation. The government contended that the question pertaining to the encounter between the defendant and Lind was material because the encounter was more one of co-conspirators than one between a lawyer and client.

Prior to his appearance the defendant had made a motion to quash the subpoena raising issues relating to the attorney-client privilege. Noting the trial court's ruling that no questions pertaining to the defendant's relationship with Lind were to be propounded to the defendant until the scope of the attorney-cleint privilege could be ascertained,[196] the court of appeals rejected the government's contention that the questioning immediately following the hearing was proper.

Judge Sprecher stated that:

> This Circuit had adopted the classic formulation of materiality; false testimony if it 'has the natural effect or tendency to impede, influence or disuade the grand jury from pursuing its investigation . . . .' Merely potential interference with a line of inquiry is sufficient to establish materiality regardless of whether the perjured testimony actually serves to impede the investigation.[197]

However, Judge Sprecher limited this broad definition noting that it is the court's function to "ascertain whether the responses of a witness charged as knowingly false relate to a matter of inquiry properly within the ambit of the grand jury's investigative powers."[198]

The court conceded that normally questions pertaining to a witness' conversation and meetings with a person who is the subject of the investiga-

(a) *Calling by court*. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. (b) *Interrogation by court*. The court may interrogate witnesses, whether called by itself or by a party. (c) *Objections*. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

FED. R. EVID. 614(a), (b), (c).

193. 552 F.2d 1265 (7th Cir. 1977). *See* text accompanying notes 57-63 *supra*.
194. 560 F.2d 281 (7th Cir. 1977).
195. 18 U.S.C. § 1621 (1970).
196. 560 F.2d at 282.
197. *Id.* at 284.
198. *Id.*

tion are material. However, Judge Sprecher concluded that "the knowledge that an attorney met with his client, without more, could not possibly assist the grand jury in its investigation, or influence it in its pursuit of facts."[199] Thus, given the relationship of the defendant to the person subject to the investigation, and the limitation on the scope of the inquiry, the court of appeals reversed the defendant's conviction.

In *United States v. Diggs*,[200] the defendant's appeal also arose out of his conviction for perjury before a grand jury. However, in this instance, the defendant's sole contention was that the government's evidence was insufficient to satisfy the "two-witness" requirement for perjury convictions. As in *United States v. Howard*,[201] the defendant's testimony before the grand jury related to an investigation of the criminal activities of John Lind. During the grand jury proceedings, the defendant denied knowing that John Lind owned a machine gun and his having taken Lind's machine gun to one Halbert Vanover. During the trial, Vanover refuted the defendant's denials. Three other witnesses corroborated Vanover's testimony. The defendant contended that the government failed as a matter of law to provide sufficient evidence of perjury insofar as they had failed to satisfy the rule that "the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury."[202]

Judge Swygert rejected this contention holding that "the two witness rule does not literally require the direct testimony of two separate witnesses, but rather may be satisfied by the direct testimony of one witness and sufficient corroborative evidence."[203] Integral to this holding was the court's assessment of the required sufficiency of the corroborative evidence. Judge Swygert concluded that:

> No wording of the rule requires the corrobative evidence to be sufficient for conviction; nor does any phrasing permit conviction where the corroboration consists of merely peripheral testimony not tending to show the falsity of the accused's statements while under oath. The two-witness rule is thus satisfied when there is direct testimony from one witness and additional independent evidence so corroborative of the direct testimony that the two when considered together are sufficient to establish the falsity of the accused's statements under oath beyond a reasonable doubt . . . . This independent corrobating evidence must be truthworthy enough to convince the jury that what the principal witness said was correct, the ultimate determination of its credibility being an exclusive function of the jury."[204]

199. *Id.* at 285.
200. 560 F.2d 266 (7th Cir.), *cert. denied*, 98 S. Ct. 404 (1977).
201. 560 F.2d 281 (7th Cir. 1977).
202. Hammer v. United States, 271 U.S. 620 (1926).
203. United States v. Diggs, 560 F.2d at 269.
204. *Id.* at 270.

Finding the corroborative evidence reasonably sufficient to convince a jury, the court of appeals held that the "two-witness" rule had been satisfied and affirmed the defendant's conviction.

United States v. Paepke[205] was a case of first impression in which the court was asked to determine to what extent the exclusionary rule would prohibit the use of illegally seized evidence to prove tax fraud allegedly committed some months after the seizure. At the time of the defendant's arrest in 1971, $12,725 was illegally seized from him. This money was subsequently turned over to the Internal Revenue Service which assessed a deficiency of approximately $26,000 for the taxable year 1971 and levied upon the funds seized. In April of 1972, the defendant filed an individual tax return for the year ending December 31, 1975, which listed an adjusted gross income of $3,275, noted a total tax due of $234, and claimed a refund of $12,491 (the money seized by the IRS).

The United States challenged this return alleging in its indictment that the defendant knowingly, under penalty of perjury, understated his adjusted gross income and misstated its source. Prior to trial, the district court granted the defendant's motion to suppress all evidence relating to the illegal search and seizure including documents concerning the defendant's efforts to retrieve the money.[206] The government appealed. The court of appeals held that the district court had erred in suppressing this evidence.

The documentary evidence which had been suppressed consisted of a tax court complaint filed by the defendant, the defendant's tax return for 1971, his refund claim filed with the IRS in 1974, and the complaint in a civil suit for refund initiated by the defendant. The issue was whether the defendant's own actions had sufficiently purged the evidence of the taint of the illegal seizure. Noting that the defendant had had five months to consider the consequences of failing to state the $12,275 as income, that he had been assisted by counsel in this decision, and that the defendant had the alternative of reporting the $12,725 and claiming the fifth amendment against self-incrimination as to its source, the court of appeals concluded that the taint had been sufficiently purged. Furthermore, the court concluded that to hold otherwise would damage the proper functioning of the self-reporting system by frustrating the enforcement process without achieving the deterrent purpose of the exclusionary rule.[207]

As to the admissibility of the illegally seized evidence, the court of appeals drew upon two cases[208] in which illegally seized evidence had been

205. 550 F.2d 385 (7th Cir. 1977).
206. *Id.* at 388.
207. *Id.* at 390-91, 393.
208. *Id.* at 392 (cited in United States v. Raftery, 534 F.2d 854 (9th Cir. 1976); United States v. Turk, 526 F.2d 654 (5th Cir. 1976)).

admitted as affirmative proof of perjury committed before a grand jury. Finding that the crime of tax fraud involves the making of false statements similar to those giving rise to a charge of perjury before a grand jury, the court of appeals quoted from the 1975 United States Supreme Court decision *Oregon v. Hass* in which it was stated: "[T]he shield provided by *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)], is not to be preverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances."[209] Concluding that the evidence concerning the fact of the defendant's possession of the money should also have been admitted, the court of appeals thus adopted the Supreme Court's philosophy that protective rules which would exclude otherwise competent evidence should not be afforded a defendant when they permit a defendant to subsequently hood-wink the courts.[210]

The petitioner's conviction in *United States ex rel. Moore v. Brierton*[211] arose from the murder of a bartender by a patron of a Lansing, Illinois bar. During the trial, a government witness had testified that two days after the murder a man whom he knew as "Slick" had told him that he had shot a Lansing bartender and that the petitioner Moore was the man whom he knew as "Slick." The petitioner's appeal from the denial of his petition for *habeus corpus* was based on his assertion that the prosecution had failed to provide him with exculpatory materials at the time of the trial. Two of the five items of allegedly exulpatory evidence withheld consisted of prior statements and comments of the witness which tended to cast doubt on his testimony at trial.[212]

The court of appeals noted that the district court had followed the test set forth in *United States v. Agars*[213] and determined that:

> Since the petitioner had made no specific request at trial for the statements of Virgil Sanders, the prosecutor's failure to turn over the five items constituted a denial of due process only if, on a consideration of the entire record, the omitted evidence created a reasonable doubt of Moore's guilt.[214]

Neither the district court nor the court of appeals found that such a violation had occurred.

209. 420 U.S. 714, 722 (1975). The Court also cited with approval *Harris v. New York*, 401 U.S. 222 (1972) and *Walder v. United States*, 347 U.S. 62 (1954).
210. *See* cases cited within note 209 *supra*.
211. 560 F.2d 288 (7th Cir. 1977).
212. *Id.* at 290.
213. 427 U.S. 97 (1976).
214. 560 F.2d at 291.

The court of appeals first found that the defendant's request for the statements in the possession of the prosecution, the Lansing police chief, or the Chicago superintendent of police taken from any witnesses subsequent to the murder was not a specific request.[215] Secondly, upon a review of the record, the court of appeals noted that there had been two eyewitnesses to the murder who had testified at trial that the defendant was the murderer.[216] And, finally, since the controversial government witness was not present when the offense was committed, it would be unlikely that the witness would be called at a new trial. Therefore, since the witness' credibility would not then be in issue, a new trial in which the evidence would be disclosed would add nothing.[217] Thus, the court of appeals affirmed the district court's determination that the undisclosed items did not create a reasonable doubt of the petitioner's guilt.

The appeal in *Pearson v. Furnco Construction Company*,[218] arose from the district court's dismissal of the petitioner's complaint for lack of standing. The court of appeals reversed and remanded.

The plaintiffs were eight black bricklayers. The defendant was a mason contractor who had performed a number of jobs in the Chicago and northern Indiana area. The controversy arose when the defendant obtained permission from the Secretary of Labor of the United States to hire Canadian bricklayers for a job at Inland Steel. To obtain permission to allow these employees to enter the United States as non-immigrants for temporary work, the defendant had to represent to the Secretary that it had been unable to find any qualified bricklayers in the United States. The plaintiffs' complaint generally alleged that they were qualified and available and would have accepted the employment if offered. Therefore, the crux of the plaintiffs' complaint was that the defendant had deliberately avoided considering them for employment. The district court had decided that the plaintiffs' lacked standing because none of them had applied to the defendant for work on the Inland job, and therefore had suffered no actual injury.[219]

Although conceding that the plaintiffs had not applied for employment, the court of appeals noted the plaintiffs had sought employment at numerous other jobs performed by the defendant in the area and that they had previously instituted suits against the defendant based on the same claims of discriminatory denial of employment. Chief Judge Fairchild concluded that:

> these plaintiffs alleged a sufficient demonstration of interest in employment which they brought to the attention of Furnco, so

215. *Id.* at 292.
216. *Id.* at 291.
217. *Id.* at 292.
218. 563 F.2d 815 (7th Cir. 1977).
219. *Id.* at 817.

> that it is fair and reasonable to treat plaintiffs as applicants for the Inland job if they can show . . . that they were available and would have applied if they had been made aware of the job. Such proof would adequately demonstrate injury to plaintiffs and entitle them . . . to the inference of discrimination . . . assuming plaintiffs can prove their qualifications.[220]

Thus, the evidentiary question posed to the court of appeals in this decision was the sufficiency of the plaintiffs' proof of actual injury to get them into court. The court of appeals concluded that the district court had erred in refusing the plaintiffs an opportunity to sustain this burden of proof.[221]

IV
CONCLUSION

Of the three hundred and forty-one published opinions rendered by the United States Court of Appeals for the Seventh Circuit from October, 1976 to the date of this writing, only twenty-nine have posed evidentiary questions. Of these twenty-nine appeals, twenty-four were criminal cases, three were section 1983 and 1981 civil rights actions, and one was a mandamus proceeding. Fifteen different Federal Rules of Evidence were expressly cited either as the basis for the objection or for the resolution of the issue in fourteen opinions. Ten of these rules could have formed the basis of the court of appeals' decision in nine opinions. In seven cases, the objections and opinions were based on criminal statutory and case law, and common law precedent having no counterpart in the Federal Rules of Evidence.[222]

The district court was reversed in only three of the fourteen opinions expressly citing the Federal Rules. However, only one of these three reversals was due to a clear conflict in the interpretation of the evidentiary rule relied upon. In a second reversal, the court of appeals relied on a federal rule which was probably not considered by the district court. In the third reversal, the courts agreed on the exclusion of the evidence but disagreed as to the extent of the prejudicial effect of the objectionable evidence.

Of the eleven opinions citing a federal rule and affirming the district court's evidentiary rulings, the court of appeals relied on an unadopted, proposed rule in one instance, differed in the district court's choice of the applicable federal rule in a second instance, and noted an additional rule supporting the district court's conclusion in a third. Thus, of these fourteen

220. *Id.* at 818.

221. *Id.*

222. In *Cyphers, Harris* and *Papia*, the court of appeals ruled on two evidentiary issues in each case. The *Cyphers* and *Papia* courts cited two Federal Rules in each. In *Harris*, one Federal Rule was cited and the other implied by this author. Thus, although this article discussed 29 cases, it is concerned with the resolution of 31 evidentiary issues.

opinions referring expressly to the Federal Rules of Evidence, it may be concluded that the trial and appellate courts were in clear agreement as to the admissibility of the evidence under the Federal Rules in nine cases. These nine cases involved the consideration of Federal Rules 404(b), 403, 611(b), 702, 704, 801(d)(2)(E) and 609(a)(2). The one clear reversal arose from the interpretation of rule 803(6), the business records exception to the hearsay rule.

In the cases in which this author discerned a federal rule basis for the court of appeals' results, the court affirmed the district court in six cases and reversed in two without citing the Federal Rules of Evidence. The affirmances were of evidentiary rulings implicitly supported by rules 1101 and 803, 201, 801 and 404(a) and (b). The court of appeals presumably disagreed with the district court's analysis of rules 501 and 608(a) in the two instances of reversal.

In sum, it may be concluded that the courts agreed on the resolution of fifteen evidentiary issues either expressly or impliedly governed by the Federal Rules. In only three instances was there complete disagreement; in four instances, no conclusion may be drawn. Of the seven cases in which the Federal Rules did not govern, the District Court was affirmed in three and reversed in four.

Several trends may be gleaned from this compliation and analysis of these cases. First, the paucity of appellate court cases dealing with evidentiary questions governed either expressly or impliedly by the Federal Rules of Evidence suggests a uniformity of opinion among lawyers and judges as to the interpretation and application of these rules. Second, this uniformity of opinion is also reflected in the incidence of affirmance on appeal. Third, the great majority of cases appealed were criminal cases. This final phenomena may be attributed to a disproportionate number of criminal to civil cases being heard in the district courts in Wisconsin, Indiana and Illinois due to the Speedy Trial Act of 1974.[223]

In short, it seems as though the Federal Rules of Evidence have been readily adopted and assimilated by all the federal courts in this Seventh Circuit. It is hoped and expected that, as time goes on, the United States Court of Appeals for the Seventh Circuit will continue to construe the rules in light of the purpose which Congress intended: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[224]

223. 18 U.S.C. §§ 3152-3156, 3161-3174 (1974).
224. FED. R. EVID. 102, 28 U.S.C.A. app. (1975).